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WORLD MARITIME UNIVERSITY

Malmö, Sweden

**AN ANALYSIS ON WRECK RELATED
NATIONAL LAWS OF THE REPUBLIC OF
KOREA CONSIDERING THE NAIROBI
INTERNATIONAL CONVENTION ON THE
REMOVAL OF WRECKS, 2007**

By

BYOUNG-YUN LEE

The Republic of Korea

A dissertation submitted to the World Maritime University in partial
Fulfillment of the requirements for the award of the degree of

MASTER OF SCIENCE

In

MARITIME AFFAIRS

(Maritime Law and Policy)

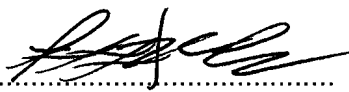
Class of 2017

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DISSERTATION DECLARATION FORM

I certify that all the material in this dissertation that is not my own work has been identified, and that no material is included for which a degree has previously been conferred on me.

The contents of this dissertation reflect my own personal views, and are not necessarily endorsed by the University.

(Signature): .....

(Date): 18th September 2017

Supervised by: Associate Professor Henning Jessen

World Maritime University

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ABSTRACT

Title of Dissertation: AN ANALYSIS ON WRECK RELATED NATIONAL LAWS OF THE REPUBLIC OF KOREA CONSIDERING THE NAIROBI INTERNATIONAL CONVENTION ON THE REMOVAL OF WRECKS, 2007

Degree: MSc

This dissertation is a study of current domestic laws of the Republic of Korea, considering the main features of the Nairobi International Convention of the Removal of Wrecks (WRC), 2007 to identify possible gaps between the Convention and the domestic laws and suggest how the national laws could be improved and enhanced through further revisions.

From the public law viewpoint, the WRC 2007 mainly deals with reporting and marking wrecks, hazard determination, and measures to facilitate the removal of wrecks. In the Republic of Korea, four different domestic laws are related to the wreck removal matter and all necessary requirements of the Convention are already in place in the national laws. However, duplications of regulations among the laws need to be reorganized and applications of the national laws in the Korean exclusive economic zone are still controversial.

On the other hand, from the private law viewpoint, the WRC 2007 requires the compulsory insurance and introduces the direct right of action against the liability insurer. In Korea, such protective measures have not been in place although the Commercial Act prohibit the limitation of liability in terms of wreck removal claims.

In order to ratify the Convention, several procedures in accordance with the Constitution of the Republic of Korea need to be conducted and the Convention may have the same effect of the national laws.

Although there have been some actions by the Ministry of Ocean and Fisheries to respond the global trend, practical limitations have not solved yet and the ratification of the Convention is unlikely to be implemented within a short period. Therefore, this dissertation proposes several law revisions to narrow the gaps between the global trend and the Korean regimes.

KEYWORDS: Wreck, WRC, Korean law, Compulsory insurance, Direct action

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LIST OF ABBREVIATIONS

CLC	International Convention on Civil Liability for Oil Pollution Damage
COLREG	Convention on the International Regulations for Preventing Collisions at Sea
EEZ	exclusive economic zone
GT	Gross tonnage
HNS	International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea
ICT	Information and Communication Technology
IMO	International Maritime Organization
ISL	Institute of Shipping Economics and Logistics
KOEM	Korea Marine Environment Management Corporation
LLMC	Convention on Limitation of Liability for Maritime Claims
MPA	Maritime and Port Authority of Singapore
P&I	Shipowners' Protection and Indemnity Insurance
SDR	Special Drawing Right
UNCLOS	United Nations Convention of the Law of the Sea
WRC	Nairobi International Convention on the Removal of Wrecks

1. Introduction

1.1. Background

After suffering severe damage due to a marine casualty such as collision or stranding, a ship may be partly or wholly sunken. The vessel's hull insurer and owner are likely to pronounce the damaged ship's commercial death, in other words, expected costs and expenses for rescuing and repairing the ship are likely to be more than the present value of the ship. Once the hull insurer and the shipowner express such decision, the ship in question legally becomes a 'wreck' (Batz, 2011).

Then, the wreck starts to bring several key players into the picture. Firstly, from the hull insurer's interest standpoint, the most cost-saving and simple solution is to pay the insurance money to the owner rather than involving any follow-up measures in relation to the wreck. Secondly, from the owner's viewpoint, the aforementioned situation may be more complicated because it is almost impossible to escape from the wreck related liability in terms of both public and private law matters, although such costs and expenses may be compensated by the Shipowners' Protection and Indemnity Association (P&I Club). The owner and the P&I Club may invite another player, a salvor, who actually conducts the wreck removal operation (Hazelwood & Semark, 2010). Lastly, the coastal State is likely to want the wreck to be immediately removed prior to be a navigational hazard or create pollution. If the wreck locates in the territorial sea of the State, there is nothing controversial to demand such wreck removal to the owner based on the State's sovereignty as well as national laws. However, a wreck beyond the territorial sea may cause a dispute that the application of the national law accords with the United Nations Convention of the Law of the Sea (Brice & Reeder, 2003).

In order to solve such problem and provide a unified and solid legal ground for the coastal State, the Nairobi International Convention on the Removal of Wrecks (WRC) was adopted in 2007 (Herbert, 2013) and the Convention entered into force in April 2015. Although there are presently 37 Contracting States including major shipping nations such as China, Liberia, Malta, Panama, Singapore, the Republic of Korea has not ratified the Convention yet.

1.2. Objectives

Although the fastest way to be in the global trend is a prompt ratification of the WRC 2007, it is likely to be a time-consuming procedure due to other political concerns or arguments in the relevant industry. Therefore, the second best option may be narrowing gaps between the WRC 2007 and the Korean laws through further revisions. From the aforementioned viewpoint, this dissertation aims to compare the WRC 2007 and national laws, analyse possible gaps between them, and then suggest several practical solutions to overcome the gaps prior to the ratification of the Convention.

1.3. Scope of study

In addition to the main contents of the WRC 2007, this dissertation studies and analyses several national and international laws and rules.

Firstly, in respect of the public law matters, the following Korean laws are mainly examined; the Maritime Safety Act and its Enforcement Rules, the Public Waters Management and Reclamation Act, the Marine Environment Management Act, and the Act on the Arrival, Departure, etc. of Ships. Also, regulations of the Territorial Sea and Contiguous Zone Act, the Exclusive Economic Zone Act, and the Act on the Establishment, Management, etc. of Spatial Data are studied.

Secondly, with regard to the private law issues, several Korean laws including the Commercial Act, the Civil Act, and the Compensation for Oil Pollution Damage Guarantee Act are mainly analysed and regulations of the Compensation for Oil Pollution Damage Guarantee Act are additionally referred. In addition, two Japanese laws, the Act on Liability for Oil Pollution Damage and the Act on Limitation of Shipowner Liability, are studied.

Thirdly, in relation to the ratification considerations, the Constitution of the Republic of Korea and reference materials from several Ministries and Agencies including the Ministry of Oceans and Fisheries, the Ministry of Foreign Affairs, the Korea Marine Environment Management Corporation, and the Korea Legislation Research Institute are examined.

Finally, miscellaneous regulations of the United Nations Convention on the Law of the Sea, the Convention on Limitation of Liability for Maritime Claims, 1976, the Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976, the Protocol of 1992 to Amend the International Convention on Civil Liability for Oil Pollution Damage, 1969, and the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 are referred and several rules of P&I insurance are additionally examined.

However, this dissertation does not intend to study about insurance related issues between the shipowner and the hull insurer as well as contractual matters between the shipowner and the salvor

2. Public Law Aspects of WRC 2007 and Korean Laws

2.1. Definition of wreck

The WRC 2007 defines the term of 'wreck' as a sunken or stranded ship, or any parts or objects lost from such ship, or a ship that is expected to sink or strand, following upon a maritime casualty (Article 1.4).

In the Republic of Korea, **Maritime Safety Act** has introduced the latest legal definition of 'wreck', although two different domestic laws already have their own definitions about wreck. Considering the contemporary development of maritime safety regimes including wreck removal matters, the Act was legislated in 2011 to wholly amend its previous version (*Sea Traffic Safety Act*) which was initially legislated in 1986 to adopt the whole contents of *Convention on the International Regulations for Preventing Collisions at Sea (COLREG), 1972* into the domestic legal framework. However, instead of the term 'wreck' and relevant expressions, the Act uses 'obstruction to navigation' and defines it as 'a thing specified by Ordinance of the Ministry of Oceans and Fisheries as an obstruction to the navigation of vessels, such as a thing dropped down from a vessel and a vessel sunken or stranded, or a thing swept away from such vessel' (Article 2). Although identical expressions do not exist between the international and national regulations, there is no significant difference in terms of general meanings and intentions as if the Act paraphrases *WRC 2007*.

The other two Korean laws are **Marine Environment Management Act, 2007** and **Public Waters Management and Reclamation Act, 2010**. The former uses the term of 'sunken ship' which is 'under the sea after any marine accident' and requires '[s]ystemic management of information on the sunken ship', '[r]isk assessment with respect to possible marine pollution accidents by the sunken ship', and '[i]mplementation of risk-mitigation measures for the sunken ship' (Article 83-2). The latter regulates that the Minister of Oceans and Fisheries or local government may order the owner of 'capsized, sunken, derelict or moored ship, derelict waste material, or other object' to remove if it is 'deemed to impede the efficient utilization of public waters' or 'deemed likely to generate water pollution' (Article 6.1).

As mentioned above, three different national Acts presently define ‘wreck’ with different expressions. Such duplication may be a natural result because there had not been an individual attention to wreck prior to the WRC 2007 and the *Maritime Safety Act*, and the wreck removal matters have been a peripheral part of the other two Acts which have been developed for their main purposes. However, it may be unnecessary any longer to maintain the three different definitions which have highly similar meanings. Therefore, from economic and efficient standpoints, it is required to maintain the definition of the *Maritime Safety Act* as a mainly consolidated one and other two Acts need to delete their own definitions and refer the *Maritime Safety Act*.

2.2. Scope of application

The WRC 2007 basically applies to the Convention area which is ‘the exclusive economic zone of a State Party’ less than 200 nautical miles from the State’s baselines (Article 1 and Article 3.1). However, in accordance with Article 3.2 of *WRC 2007*, Contracting States may ‘extend the application of this Convention to wrecks located within its territory, including the territorial sea’. As of the 25th of August 2017 and among 37 Contracting States, 17 States including major European nations such Denmark, Finland, France, Netherlands and United Kingdom extend the application of the Convention to their territorial sea, whereas Germany applies the Convention only to its exclusive economic zone.

In South Korea, the ***Maritime Safety Act*** basically applies to vessels which are ‘within the territorial sea or inland waters of the Republic of Korea’ (Article 3.1.1). Further, the Act also applies to Korean flag vessels if they are in ‘any sea area other the territorial sea or inland waters’ (Article 3.1.2), and any ships that create ‘an obstruction to navigation in the exclusive economic zone of the Republic of Korea (Article 3.1.3). Meanwhile, the ***Marine Environment Management Act*** applies in ‘territorial sea provided for in the *Territorial Sea and Contiguous Zone Act*’ which is 12 nautical mile areas from Korean base lines as well as ‘exclusive economic zones defined in Article 2 of the *Exclusive Economic Zone Act*’ (Article 3) which are 200 nautical mile seas from the baseline. Lastly, the ***Public Waters Management and Reclamation Act*** defines ‘public waters’ as ‘space from a coastline referred to in Article 6.1.4 of the *Act on the Establishment, Management, etc. of Spatial Data*’ which

is the approximate highest high water level to 'the outer limit of the exclusive economic zone under the *Exclusive Economic Zone Act*' (Article 2.1).

As mentioned in the previous paragraph, the Korean laws related to wreck removal matters apply to not only Korean territorial seas but also 200 nautical mile exclusive economic zones. However, two arguments may arise with regard to the scope of application. Firstly, several laws concurrently exist with substantially the same regulations for wreck removal matters. For this matter, a similar consolidation among the national laws as mentioned in the previous section (2.1 Definition of wreck) may be possible. The second argument is that any persons responsible for the wreck without pollution may insist that the domestic laws should not apply in the EEZ based on Article 56.1.(b).(iii) of the United Nations Convention on the Law of the Sea (UNCLOS). This may be more difficult and controversial issue because it is uncertain that which opinion between the claimant (the affected State) and the defendant is more legally robust. Therefore, it is necessary for Korea to ratify the WRC 2007 to eliminate such uncertainty and controversy.

2.3. Reporting wrecks

The WRC 2007 regulates that '[a] State Party shall require the master and the operator of a ship flying its flag to report to the Affected State without delay when that ship has been involved in a maritime casualty resulting in a wreck' (Article 5.1). Furthermore, such report is required to include the exact location of the wreck and its type, size, damage, condition, cargo and oil (Article 5.2).

Similarly, in Korea, the ***Maritime Safety Act*** stipulates that master, owner or operator of any ship (i.e. regardless of the ship's nationality) 'that has created any of the following obstructions to navigation shall report the location of the obstruction to navigation, the hazards defined in Article 27, etc., without delay, to the Minister of Oceans and Fisheries' (Article 25.1). The obstructions to navigation (the term used in the Act instead of 'wreck') include '[a]n obstruction to navigation, which is floating or sunken to impede the safe navigation of other vessels and disturbs the order of marine traffic' (Article 25.1.1) and '[a]n obstruction to navigation, which is likely to contact with facilities and other vessels in the water zone of a port or harbour' (Article 25.1.2).

Furthermore, the Article 25.2 also rules that '[i]f a Korean vessel produces an obstruction to navigation in the exclusive economic zone of a foreign country, the person responsible for the removal of the obstruction to navigation shall report thereon to the government of the foreign country having jurisdiction over the sea area'. Thus, from the reporting standpoint, Article 25 of the Act includes all necessary requirements of the WRC 2007, although Korea has not ratified the Convention yet.

Statistics of reported wreck in Korea

In respect of statistics of reported wrecks in South Korea, 'Sunken Ship Management Plan 2017' has been recently issued by Korea Marine Environment Management Corporation (KOEM) which has been established in accordance with *Marine Environment Management Act* and consigned by Ministry of Ocean and Fisheries to conduct such survey. According to the survey, from 1983 and as of the end of 2016, total 2,180 ships have sunken in Korean waters. In terms of specific locations of the wrecks, 923 wrecks (42%) have located in the South Coast of Korea. In addition, 806 wrecks (37%) and 451 wrecks (21%) have located in the West Coast and East Coast respectively. Meanwhile, in terms of ships' size, almost a half of them (48%, 1,043 ships) are small ships under ten (10) gross tonnages, 39% (858 ships) are between ten (10) to 100 gross tonnages, and remaining 13% (279 ships) are bigger vessels more than 100 gross tonnages. Furthermore, in terms of ships' type, whereas the vast majority (81.2%, 1,771 ships) of them are fishing vessels which may not significantly harm marine environment, and 6% (129 ships) of the sunken ships have been identified as highly risky wrecks which have significant amount of fuel oil, hazardous or noxious cargo.

Table 1. Reported wrecks in South Korea

Ship's Type	Numbers	Percentage	Remarks
Fishing	1,771	81.2%	
Passenger	12	0.6%	Harmful 129 wrecks
Bulk	108	5.0%	

Tanker	5	0.2%	(6%)
Gas Carrier	2	0.1%	
Chemical Tanker	2	0.1%	
Others *	280	12.8%	
Total	2,180	100%	

* Others: Towing vessel (74, 3.4%), Barge (56, 2.6%),
Miscellaneous (53, 2.4%), Unidentified (97, 4.5%)

Source: Korea Marine Environment Management Corporation (KOEM)

2.4. Determination of hazard

In respect of hazard determination, Article 6 of the WRC 2007 considers a lot of criteria such as condition of the wreck itself as well as its cargo and oil, hydrographical, meteorological, technical, marine environmental and maritime traffic elements.

The **Maritime Safety Act** rules that it needs to be considered ‘whether an obstruction to navigation seriously affects the safety in navigation of vessels or the marine environment in determining hazards of the obstruction to navigation’ (Article 27.1). Although the details of such considerations do not be included in the Act, its lower ordinance (Article 27 of *Enforcement Rules of the Maritime Safety Act*) contains all aspects of the criteria included in the Convention. Furthermore, Article 6.2 of the **Public Waters Management and Reclamation Act** stipulates that the management agency of public waters needs to conduct ‘a prior investigation’ to ascertain whether a wreck may create pollution or impediment of maritime utilization considering ‘various circumstances, such as the present condition and location of the relevant derelict ship, etc. when discovered, any risk of generating a maritime accident or water pollution caused thereby, or whether any impediment exists to the management and utilization of public waters’. Therefore, from the public law standpoint, the Korean laws has individually accorded with the international tendency, and such regulations may be more uniformly organized with revisions to some extent.

2.5. Marking of wrecks

The WRC 2007 rules that marking steps have to be conducted if 'the Affected State determines that a wreck constitutes a hazard' (Article 8.1). Also, the marking process should be in accordance with 'internationally accepted system of buoyage' (Article 8.2) and such marking needs to be promulgated by proper means such as 'nautical publications' (Article 8.3).

Article 26 of the ***Maritime Safety Act*** also deals with such marking procedures that '[i]f an obstruction to navigation is likely to jeopardize the safety in navigation of other vessels, the person responsible for the removal of the obstruction to navigation shall put a sign indicating the hazard on the obstruction to navigation or take measures for informing other vessels of the obstruction without delay' (Article 26.1). This is one of legal liabilities of owner or operator of the wreck. If they do not fulfil such obligation, 'the Minister of Oceans and Fisheries may order the person responsible for the removal of the obstruction to navigation to put such sign or take the measure' (Article 26.2) and furthermore, the Minister of Oceans and Fisheries 'directly put a sign indicating the obstruction to navigation' if the person responsible does not follow such order (Article 26.3). Thus, in respect of the marking matters, a sufficient level of detail including vicarious execution is in place in the national regime.

2.6. Measures to facilitate the removal of wrecks

The WRC 2007 regulates that the Affected State needs to inform 'the State of the ship's registry and the registered owner' about the wreck if it is determined as 'a hazard' and discuss wreck removal matters with the concerned States (Article 9.1). The person responsible to remove the wreck is 'the registered owner' (Article 9.2), and the owner has to provide an insurance certificate or other security to government of the Affected State (Article 9.3). Meanwhile, the registered owner may hire a salvor for wreck removal operation. In respect of such activities, the Affected State's rights are limited only to 'the extent necessary to ensure that the removal proceeds in a manner that is consistent with considerations of safety and protection of the marine environment' (Article 9.4), and it is possible for the Affected States to 'intervene' in the operation with regard only to the effectiveness of operation, safety, and environmental

protection (Article 9.5). The Affected State is required to determine a reasonable period of such wreck removal operation and inform the period to the owner. Further, the owner needs to be informed that the wreck may be removed at 'the registered owner's expense' if the owner misses the deadline of operation, and the States may conduct the immediate intervention if the wreck becomes a severe hazard (Article 9.6). The Affected State may remove the wreck by itself if it is impossible to contact the registered owner or the wreck removal operation is not completed within the period with a proper notification to the wreck's flag State (Article 9.7 and 9.8).

In Korea, Article 28 of the **Maritime Safety Act** stipulates that 'the person responsible for the removal of an obstruction to navigation shall remove the obstruction to navigation' (sub-article 1). If the person above does not conduct such measures, the Minister of Oceans and Fisheries can order the person for such measures based on Article 28.2 of the Act. Furthermore, the Minister of the authority also may remove the wreck if the person above does not conduct the order or the wreck is 'determined as hazardous' (Article 28.3). In addition, Article 29.1 of the Act deals with the collection of wreck removal costs. It rules that the Minister of Oceans and Fisheries may 'demand the shipowner to submit a document guaranteeing the payment of such cost' with regard to marking and removing the wreck. If the shipowner or operator does not obey such demand, in accordance with Article 30 of the Act, the Minister of the authority can ban the entry of the ship in question into Korean ports or mooring facilities, or the departure therefrom.

Meanwhile, three different domestic laws also deal with the wreck removal measures. Firstly, in accordance with the **Public Waters Management and Reclamation Act**, if a wreck is 'deemed to impede the efficient utilization of public waters' or 'deemed likely to generate water pollution', the Minister of Oceans and Fisheries or local government may order shipowner or occupant to remove the wreck (Article 6.1). The central or local government may remove wrecks by themselves if 'the owner or occupant of a derelict ship, etc. has failed to comply with the order of removal' or such person responsible is unknown (Article 6.3). Secondly, Article 40 of the **Act on the Arrival, Departure, etc. of Ships** stipulates that the Minister of Oceans and Fisheries may order owners or users of an object which obstructs the navigation of vessels in a trade port or in a place adjacent to the water zone of a trade

port' (Sub-article 1). If the owners or users in question do not comply with such order, the Authorities may 'vicariously execute the ordered matter pursuant to Article 3.1 and 3.2 of the *Administrative Vicarious Execution Act*' (Sub-article 2). However, this procedure may be bypassed if the owners or users are unknown, or 'water front facilities' are 'illegally occupied and used repeatedly and habitually', or obstacles need to be removed immediately due to navigation of ships (Sub-article 3). Lastly, the ***Marine Environment Management Act*** rules that the Minister of Oceans and Fisheries conducts 'systemic management of information on the sunken ship', 'risk assessment with respect to possible marine pollution accidents' and 'implementation of risk-mitigation measures' to prevent further pollution damage by the wrecks (Article 83-2.1).

Thus, from the public law viewpoints including definition, reporting and marking of wrecks, and determination of hazard, any possible gaps between the WRC 2007 and the domestic laws have not been identified, except the controversy that whether the national laws may apply to wrecks without pollution in the Korean EEZ. The national regime has corresponded with the global trend through continuous revisions, and is likely to be more concise and explicit through the realignment of regulations.

Rearranged segregation of duties in the Ministry of Oceans and Fisheries

The following chart shows the headquarter organization of Ministry of Oceans and Fisheries, Republic of Korea. The headquarter consists of six major Offices and Bureaux as well as eight sub-Bureaux as below. In terms of wreck related domestic Acts, three different departments in the Ministry are concurrently related; firstly, the Marine Policy Office is in charge of both the '*Public Waters Management and Reclamation Act*' (assigned to Marine Industry Policy Bureau) and the '*Marine Environment Management Act*' (assigned to Marine Environment Policy Bureau), secondly, Shipping and Logistics Bureau is in charge of the '*Act on the Arrival, Departure, etc. of Ships*', and lastly, Maritime Affairs and Safety Policy Bureau is in charge of the '*Maritime Safety Act*'. From both efficiency and management standpoints, such segregation of duties appears to be unnecessarily overlapping and an adjustment or rearrangement of work scope may be required.

Among the relevant departments, the last mentioned Maritime Affairs and Safety Policy Bureau is likely to be the most appropriate one for the wreck removal matters because of two reasons; firstly, only the *Maritime Safety Act* has a separate chapter of wreck related regulations with the most comprehensive considerations from the public law standpoint, secondly, the department is also in charge of the ship related compensation Act, *Compensation for Oil Pollution Damage Guarantee Act*, which adopts both the *Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969* (CLC PROT 1992) as well as the *International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001* (BUNKERS 2001).

Headquarters Chart

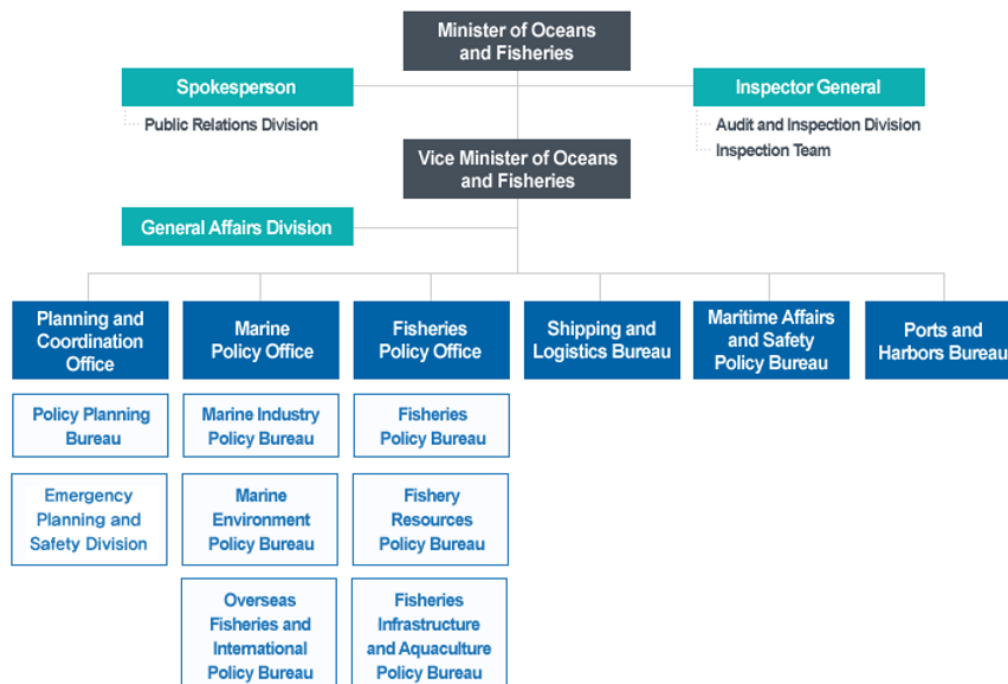


Figure 1. Headquarters chart of Ministry of Oceans and Fisheries

Source: Ministry of Oceans and Fisheries (www.mof.go.kr)

3. Private Law Related Analyses and Several Suggestions

3.1. Liability of shipowners

3.1.1. The international regime

The WRC 2007 regulates that the registered owner is basically liable to pay expenses of 'locating, marking and removing the wreck'. However, such liabilities may be exempted if the owner proves that the wreck 'resulted from an act of war, hostilities, civil war, insurrection, or a natural phenomenon of an exceptional, inevitable and irresistible character', or 'was wholly caused by an act or omission done with intent to cause damage by a third party', or 'was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function' (Article 10.1). The requirements of the liability exemption are identical with the requisites of the *Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969* (CLC PROT 1992) as well as the *International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001* (BUNKERS 2001). Such similarity may be construed as the aforementioned three conventions locate under the same umbrella which imposes liabilities of costs and expenses due to any ship-sourced damage.

In addition, the Convention does not affect the owner's rights about the limitation of liability in accordance with domestic laws or international liability conventions such as the '*Convention on Limitation of Liability for Maritime Claims, 1976*, as amended' (Article 10.2). Also, WRC 2007 rules that claims against the owner must be in accordance with the Convention and State's sovereign rights in respect of its territorial seas are not affected by the Convention (Article 10.3). Furthermore, any third parties' rights of recourse also do not be affected by the Convention (Article 10.4).

Meanwhile, in respect of exceptions to liability, WRC 2007 does not affect shipowner's liability in respect of costs and expenses related to the '*International Convention on Civil Liability for Oil Pollution Damage, 1969*, (CLC 1969) as amended' as well as the '*International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001*, (BUNKERS 2001) as amended. Although WRC 2007 also regulates that it does not affect to the enforcement of the '*International Convention on Liability*

and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996, (HNS 1996) as amended', this is actually ineffective because such exceptions are applied only if the relevant conventions are 'applicable and in force'. Further, WRC 2007 also does not affect to nuclear related regimes ('The Convention on Third Party Liability in the Field of Nuclear Energy, 1960, as amended', or 'The Vienna Convention on Civil Liability for Nuclear Damage, 1963, as amended', or 'national law governing or prohibiting limitation of liability for nuclear damage').

3.1.2. Relevant Korean laws

In the Republic of Korea, the **Maritime Safety Act** stipulates that the registered owner pays expenses in respect of marking and removing wrecks (Article 29.2). In addition, Article 83-2.3 of the **Marine Environment Management Act** regulates that the registered owner pays the expenses with respect to the 'implementation of risk-mitigation measures' to prevent further pollution damage by the wrecks.

In respect of shipowners' limitation of liability, however, the aforementioned domestic laws do not have any relevant regulations. Therefore, it is necessary to apply a more general law, **Commercial Act** as amended. Article 769 of the Act basically rules that shipowners are entitled to limit their liabilities 'whatever the cause for the claim may be', unless the damage occurs because of 'wilful misconduct or other reckless act or omission while recognizing the concern about the incurrence of such damage'. The liabilities of shipowners include claims of loss of life or injury and shipment damage or loss in relation to ship operation, claims of delay of shipment or passenger, claims of 'infringement on another person's right, other than a contractual right' with regard to the operation of ship, and claims of measures to 'prevent or minimize' aforementioned damage and their consequential loss. This Article is the result of borrowing the contents of the *Convention on Limitation of Liability for Maritime Claims (LLMC), 1976*. Although the Republic of Korea has not ratified the LLMC 1976, the national law has derived its regulations from LLMC 1976's Article 2.1.(a), (b), (c), and (f). This means that limitation of liabilities in respect of both the claims with regard to wreck removal [Article 2.1.(d)] and the claims with regard to cargo removal [Article 2.1.(f)] have not been adopted into the Korean law, as if the

opt-out reservation rule (Article 18 of LLMC 1976) is applied. Such legal introduction results a similar legal effect of the ratification of the international convention, and may be a compromised or negotiated methodology to follow the international mainstreams in respect of liability and compensation issues.

With regard to the limitation amount of shipowner's liability, Article 770.1 of the *Commercial Act* rules that a claim of 'a death of a passenger or a bodily injury' is calculated by multiplying the number of passengers by 175,000 SDR (Special Drawing Right) of the International Monetary Fund. This calculation has been derived from Article 7 of the *Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976* (LLMC PROT 1996). Although the Republic of Korea has not ratified LLMC 1976 as well as LLMC PROT 1996, both international regimes are selectively adopted into the Commercial Act. In other words, the Act has introduced the amount of LLMC PROT 1996 in respect of passenger claims, whereas the amount of LLMC 1976 is basically applied to other types of damage. For example, the Article 770.1 also regulates that the limitation amount of loss of life or injury other than a passenger is 167,000 SDR and 333,000 SDR for a ship of less than 300 tons and 500 tons respectively. Then, exceeding tonnages are multiplied by 500 SDR (up to 3,000 tons), 333 SDR (up to 30,000 tons), 250 SDR (up to 70,000 tons) and 167 SDR that are identical calculations with Article 6.1.(a) of LLMC 1976. Furthermore, the limitation amount of other claims is 83,000 SDR and 167,000 SDR for a ship of less than 300 tons and 500 tons respectively. Then, exceeding tonnages are multiplied by 167 SDR (up to 30,000 tons), 125 SDR (up to 70,000 tons) and 83 SDR that are also identical calculations with Article 6.1.(b) of LLMC 1976.

Meanwhile, the Article 773 of the *Commercial Act* stipulates five types of exclusion of liability limitation. The relevant part among the five cases is that '[a] claim for a ship sunken, wrecked, stranded, abandoned, or involved with other marine accidents, and salvage, removal or scrapping of, or non-invasive measures for cargo and other goods which are or were in such ship'. This corresponds with the intention of Article 769 of the *Commercial Act* (as if the Article 2.1.(d) and (f) of LLMC 1976 are opted out) and is an explicit clause to eliminate any arguments in relation to whether a shipowner is entitled to limit liabilities with regard to wreck-related costs and expenses.

However, the aforementioned Article has been used by those who raise an objection to ratify the WRC 2007. They argue that exclusion of liability limitation in respect of wreck removal may be jeopardized because shipowners may limit their liabilities (the amount of LLMC 1976) in accordance with the Convention. Such argument is, however, a misunderstanding about the context of the Convention as well as its intentions. It should be reminded that Article 10.2 of the WRC 2007 explicitly mentions that '[n]othing in this Convention shall affect the right of the registered owner to limit liability under any applicable national or international regime, such as the Convention on Limitation of Liability for Maritime Claims, 1976, as amended'. This means that in terms of limitation of liability, existing national laws in Contracting States or relevant international conventions have priority over the WRC 2007. Thus, the Convention is not concerned or involved in deciding whether a shipowner is entitled to limit wreck-related liabilities, and entirely delegates or authorizes such power to the domestic laws or international regime which Contracting States have ratified. In fact, there is no provisions such as shipowners are 'entitled to limit their liability' under WRC 2007, or how to calculate limitation of liabilities using gross tonnages of ships, whereas CLC PROT 1992 does have such provisions in Article V. Therefore, it is a correct understanding that the amount in accordance with LLMC 1976 is the minimum figures of liability insurance as a legal safeguard against the huge amount of wreck removal costs, and not the maximum amount of liability which shipowners may enjoy.

3.1.3. A comparison with a Japanese law

In Japan, Article 7. (i) of ***Act on Limitation of Shipowner Liability*** (Act No. 94) stipulates that the limitation amount where 'a person seeks to limit liability only in respect of property damage claims' is 1,510,000 SDR for a ship of and less than 2,000 tons. Then, exceeding tonnages are multiplied by 604 SDR (up to 30,000 tons), 453 SDR (up to 70,000 tons), and 302 SDR that are identical calculations with the 2012 amendment to the LLMC PROT 1996 which increases every amounts by 51%. In addition, Article 7. (ii) of the Japanese Act regulates that the limitation amount of other cases (including loss of life and injury) is 4,530,000 SDR for a ship of and less than 2,000 tons. Then, exceeding tonnages are multiplied by 1,812 SDR (up to 30,000 tons), 1,359 SDR (up to 70,000 tons) and 906 SDR that are also identical calculation

with the 2012 amendment to the LLMC PROT 1996 which was accessed by Japan in 2006.

3.2. Compulsory insurance or other financial security

3.2.1. The international convention

From shipowners' liability and compensation standpoints, Article 12 of the WRC 2007 contains the most important requirements to deal with the private law related issues. Basically, in accordance with Article 12. 1 of the Convention, if a ship's gross tonnage is 300 or more, its registered owner needs to obtain and maintain an insurance certificate or other type of security which guarantees shipowner's liability cover. The coverage of such insurance or security is required to be at least an amount of the '*Convention on Limitation of Liability for Maritime Claims, 1976*, (LLMC 1976) as amended'. Shipowners are required to submit the evidence of liability cover to the State's competent authority, then the owners can obtain another document which is issued by the government and confirm the validity of compulsory liability coverage. The official document includes ship's basic information such as name, identification number or letters, registry, tonnage, and information about the shipowner and insurer including name and place of business, and insurance coverage such as limit and period (Article 12.2). The following sub-articles (from Article 12.3 to Article 12. 9) deals with miscellaneous procedures in respect of certificate issuance, including delegation of authority to a recognized organization (Article 12.3), official language and its translation into English, French or Spanish (Article 12.4), requirement of keeping the certificate on board (Article 12.5), certificate's valid period (Article 12.6), flag State's determination of certificate issuance and validity (Article 12.7) and acceptance of certificates of foreign flag ships (Article 12.9).

3.2.2. Shipowners' Protection and Indemnity (P&I) Insurance

In practice, the costs and expenses in respect of wreck marking and removal are generally covered by Shipowners' Protection and Indemnity (P&I) Insurance. In accordance with 'The Rules & Bye-Laws 2017' issued by UK P&I Club, covered risks include liabilities regarding to 'raising, removal, destruction, lighting or marking of the

wreck of an entered ship' if such responsibilities are obligated by law (Section 15.A). Also, costs in respect of 'raising, removal or destruction of any property being carried or having been carried on an entered ship' are covered if such expenses are mandatory by law (Section 15.B). If secondary losses or expenses occur due to the activities in relation to wreck, such liabilities may be additionally compensated in accordance with Section 15.C of the P&I Rules. Finally, legal liabilities which imposed 'as the result of the presence or involuntary shifting of the wreck', or 'shipowners' failure to remove, destroy, light or mark such wreck' are covered by P&I Insurance including costs and expenses due to 'the discharge or escape from such wreck of oil or any other substance' (Section 15.D). Thus, from the shipowners' interest standpoint, all kinds of potential losses can be compensated by the liability insurance unless there is shipowner's wilfulness to cause the wreck related losses.

In the Republic of Korea, two P&I insurers currently provide shipowners' liability insurances with regard to wreck related costs and expenses. For instance, 'The Korea Shipowners' Mutual Protection and Indemnity Association' (Korea P&I Club) covers such liabilities under its Rule 25 which is for 'loss of or damage to property'. According to the Rule 25.3, the insurer compensates a shipowner's payments for 'raising, moving, removing, or destroying the Entered Ship, its fuel, cargo, or property therein, or installing lighting or marking on the ship' if such measures are obligated by enforced laws.

Meanwhile, it should be noted that not every liability insurer can provide the proper insurance policy for shipowners because prior to the issuance of government certificates, the 'appropriate authority' of Contracting States is required to ascertain whether Article 12.1 (insurance coverage at least equal to LLMC 1976) is complied with. Practically, maritime authorities maintain lists of approved insurers in advance and update the lists by assessing the insurers' performance including financial stability. In Singapore, for example, in accordance with Shipping Circular to Shipowners (No. 13 of 2017) announced by Maritime and Port Authority of Singapore (MPA), the agency has 'the list of MPA recognised IG and non-IG clubs, including fixed premium underwriters' (Article 6). In the first page of the 'List of Recognised International Group P&I Clubs by MPA for Issuance of Bunker Convention (BCC) and Wreck Removal Convention (WRC) Blue Card', thirteen liability insurers which

globally run the mutual P&I insurance are included. Further, the second page of the document lists fifteen 'Non-international Group and Fixed Premium Underwriters by MPA' for the same purpose. Whereas Korea P&I Club is included in the second page, the other Korean liability insurer, Korea Shipping Association, is not on the approved list. Thus, only 28 insurers are approved by Singapore government to provide the WRC blue card, although there are numerous non-life insurance companies in the global insurance market.

3.2.3. A comparison with Japanese laws

In Japan, with regard to pollution damage from ships as well as liability and compensation matters, ***Act on Liability for Oil Pollution Damage*** (Act No. 95) is applied which has a similar structure of the Korean law, *Compensation for Oil Pollution Damage Guarantee Act*. In other words, the Japanese Act also domestically accepts both CLC PROT 1992 and BUNKERS 2001 into one single law. However, there is one important difference between the laws of Korea and Japan, and it creates a great consequence with regard to wreck removal matters from insurance viewpoint. The Article 39-5.(ii) of the Japanese Act regulates that liability insurance or security is required to include a payment guarantee 'in the case a general ship is left abandoned in the territory of Japan by the reasons such as stranding, sinking, etc., the damage incurred by the owner of general ship by the payment of the cost for removing the said general ship or taking other measures when they are responsible for the performance of them pursuant to the provisions of the Ports and Harbors Act (Act No. 218) or other laws and regulations'. This regulation applies to ships more than 100 gross tonnages in accordance with Article 39-4 of the same Act. As a result, Japan has already achieved one of the purposes of WRC 2007, i.e. providing compulsory insurance or security for wreck removal costs, by revising the national law prior to ratifying the international convention. This may be one of the most practical and effective measures for the Republic of Korea to correspond with the global maritime trend about the wreck removal issues.

3.2.4. A possible revision of the Korean law

In terms of the revision of domestic laws of the Republic of Korea, the most urgently necessary one is to require ships more than 100 gross tonnages to obtain and maintain the liability insurance or financial security for wreck related costs and expenses. Although in Japan the oil pollution related law includes such requirement, it is more natural in the Republic of Korea that the *Maritime Safety Act* includes such provision because only the Act has an individual chapter with regard to wreck issues and the most comprehensive regulations.

Meanwhile, the consequence of aforementioned revision may be predicted with several statistics. The following table shows ship-wrecks in the territorial sea of the Republic of Korea, as of December 2015. Among 2,158 wreck, almost a half (47.7%) of them are small ships under ten gross tonnage including coastal fishing vessels. The next biggest groups are ten to fifty gross tonnages (590 wrecks, 27.3%) and 50 to 100 gross tonnages (259 wrecks, 12.0%). In respect of the gross tonnages of compulsory insurance, if 100 GT is applied, 279 wrecks (12.9%) may be under the new regulation. If 300 GT is applied, only 146 wrecks (6.7%) may be under the compulsory insurance rule. Although the difference between the two case is not significant because the vast majority of wrecks are less than 100 GT, it is still necessary to introduce the stricter rule to protect coastal environment and ensure safe navigation of ships.

Table 2. Gross tonnages of ship wrecks (December 2015)

Gross tonnage	Number of wrecks	Percentage
Less than 10	1,030	47.7%
10 to 50	590	27.3%
50 to 100	259	12.0%
100 to 300	133	6.2%
300 to 500	32	1.5%
500 to 1,000	41	1.9%
1,000 to 3,000	55	2.5%

3,000 to 10,000	15	0.7%
More than 10,000	3	0.1%
Total	2,158	100%

Source: Ministry of Oceans and Fisheries (www.mof.go.kr)

3.3. The direct right of action against the insurer

From liability insurance and compensation standpoints, Article 12.10 of the WRC 2007 is the most powerful and effective tool to protect victims of marine casualties because it is impossible for the liability insurers (so-called P&I Clubs) to conceal themselves behind shipowners. The 'pay to be paid' rule have historically allowed P&I Clubs to deny their contractual obligations to pay the insurance compensations if shipowners fail to pay their claims or are bankrupt. From victims' interests point of view, the 'pay to be paid' rule might have been frequently and deliberately used to protect financial interests of both shipowners and P&I Clubs. Although it may be a truly effective legal protection for P&I Clubs because the P&I insurance contract exists only between a shipowner and a P&I Club and the contractual indemnifying liability may not be expanded to any other third parties. This is why both CLC PROT 1992 and BUNKERS 2001 have introduced the direct right of action against the insurer, and the international liability and compensation conventions have successfully settled in the contemporary maritime legal framework. The WRC 2007 also intends to use such tool to prevent any persons responsible and their insurers to escape from legal responsibilities. The Article 12.10 regulates both rights and responsibilities of the liability insurer. On one hand, from the insurer's responsibilities standpoint, shipowners' liability insurer may be 'directly' claimed in relation to wreck marking and removal. On the other hand, from the insurer's rights standpoint, it is allowed for the liability insurer to use defences that 'the registered owner would have been entitled to invoke' such as limitation of liability, except the 'bankruptcy or winding up of the registered owner'. The limitation of liability by the insurer is possible even if the owner does not possess such right. Also, the insurer may require the owner to participate the lawsuit regarding wreck.

In the Republic of Korea, it is possible for claimants to directly sue against liability insurers if an oil spill occurs due to a wreck of tanker vessel or any other type of ship, based on CLC PROT 1992 and BUNKERS 2001 which South Korea has ratified in 1997 and 2009 respectively, as well as the national law, the *Compensation for Oil Pollution Damage Guarantee Act* which domestically adopts CLC PROT 1992 and BUNKERS 2001 into one single law. In accordance with Article 16 of the Korean Act, victims of oil pollution from oil tankers may directly claim against insurers that provide 'indemnity contracts' to the shipowners, unless the accident occurs due to 'intentional misconduct' of the owners (Sub-article 1). The liability insurers may have only defences that shipowners may argue against the claimants (Sub-article 2). Vessels other than tankers are also under the same rules based on Article 49 of the Act. The Article regulates that '[a]s for the indemnity contract for damage compensation and the compensation for damage against the insurers, etc. of general vessels and oil storage barges, Articles 16 through 19 shall apply mutatis mutandis'. However, with regard to a wreck itself, i.e. without oil spill, there is no such protective legal mean which allows direct claims against insurers under the current legal system in Korea. Thus, if a shipowner does not possess solvency for costs of wreck marking and removing in Korean waters, central or local government have to bear such expenses and they are ultimately tax payments by national people including victims, even though a robust liability insurer exists behind the bankrupt shipowner. Therefore, a new regulation of direct action for wreck itself is required to be supplemented through a further revision.

3.4. Time limits

With regard to time limits of wreck related claims, the WRC 2007 rules that such rights are extinguished 'unless an action is brought hereunder within three years from the date when the hazard has been determined' (Article 13). Further, it is impossible to bring an action 'after six years from the date of the maritime casualty that resulted in the wreck'. The Article 13 is identical with the corresponding articles of CLC PROT 1992 and BUNKERS 2001. Thus, this is also one of the evidence that the WRC 2007 and the other international conventions are under the same policy consideration in a broad concept.

In South Korea, with regard to the time limits of oil pollution from tankers or other type of ships, the exactly same rules are in place in accordance with the *Compensation for Oil Pollution Damage Guarantee Act* which embraces both CLC PROT 1992 and BUNKERS 2001. However, for the wreck removal matters without oil spill, there is no such time limit regulation in the Act as well as in the *Commercial Act*. Thus, a more general law, i.e. **Civil Act**, shall be applied. From the private law standpoint, the damage due to wrecks may be construed as an instance of tort. Article 750 of the Civil Act stipulates that '[a]ny person who causes losses to or inflicts injuries on another person by an unlawful act, intentionally or negligently, shall be bound to make compensation for damages arising therefrom'. Further, Article 766 of the Act regulates about legal prescriptions of rights to claim. Sub-article 1 rules that '[t]he right to claim for damages resulting from an unlawful act shall lapse by prescription if not exercised within three years commencing from the date on which the injured party or his/her legal representative becomes aware of such damage and of the identity of the person who caused it'. In addition, sub-article 2 rules that '[t]he provisions of paragraph 1 shall also apply if ten years have elapsed from the time when the unlawful act was committed'. Therefore, the period from the date of the maritime casualty that causes the wreck may be reduced from ten years (in accordance with the Civil Act) to six years if the Republic of Korea ratifies the Convention, in accordance with the principle of *lex specialis derogat legi generali*.

Meanwhile, it should be noted that shipowners need to be careful in terms of time limit or time bar, because a gap between the WRC 2007 and the P&I Insurance may create an unprotected situation. For instance, although the WRC 2007 grants three years of time limit to bring an action and six years to extinguish any liabilities, Rule 5.O (Time bar) of the UK P&I Club limits the insurance cover that a shipowner's indemnifying claim against the P&I Club is 'discharged' and the insurer is 'under no further liability' if the owner fails to inform the insurer about any accident, claims, costs or expenses 'within one year' after the owner's awareness about them. In the worst case, a shipowner may fail to utilize the insurance cover due to the misunderstanding about the regulations and rules, and has to bear a huge amount of wreck related costs without insurance cover. Meanwhile, Korea P&I Club regulates that such recovery is basically available only for two years from the accident 'unless the Board of the directors in its discretion decides otherwise'. Although shipowners who have

contracted their P&I insurances with Korea P&I Club may have one more year for notification of the insurance claims, they still need to be keen about the time limit or time bar to protect their contractual rights.

4. Considerations on the Ratification of the WRC 2007

4.1. Legislative system of the Republic of Korea

Prior to considering the ratification of the WRC 2007, it is highly necessary to understand the Korean legislative system. According to *Korea Legislation Research Institute* which is one of government-funded research institutes, the Korean legislative system has five classes as shown in the below diagram.

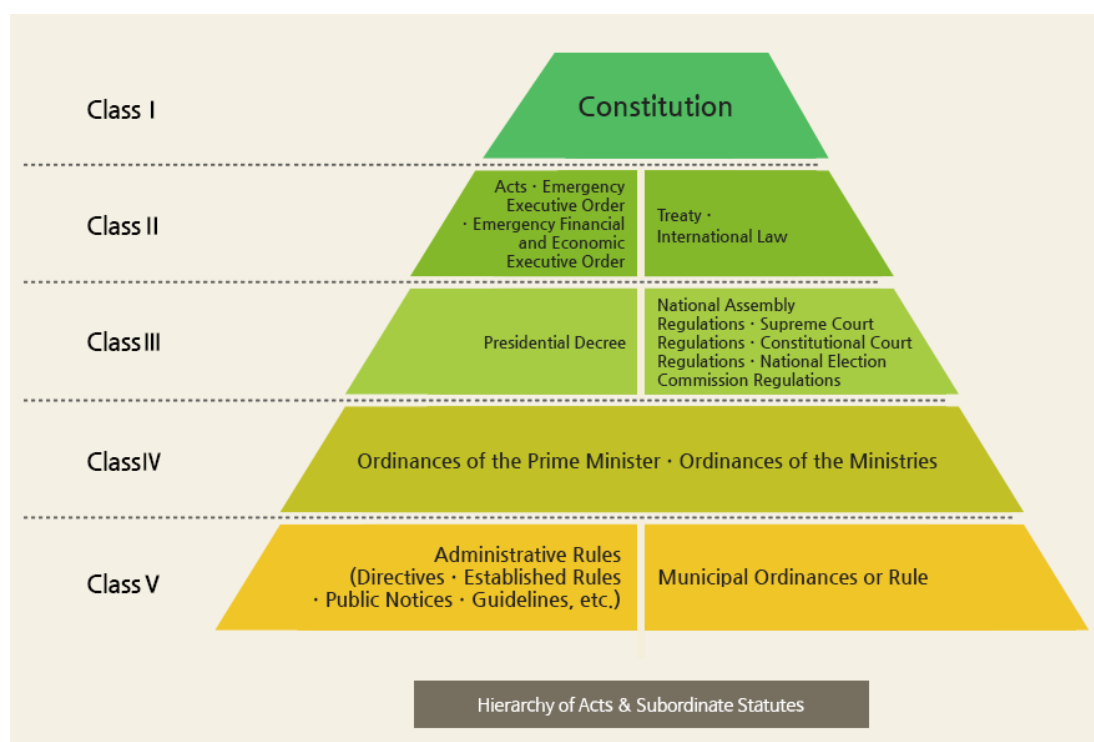


Figure 2. Hierarchy of Korean laws

Source: Korea Legislation Research Institute (<https://elaw.klri.re.kr>)

The Constitution is the paramount law which basically regulates fundamental issues including the system of the Korean government and the national people's rights and responsibilities. All the lower classes of regulation are required to comply with the Constitution's principles and philosophy. The second class basically consists of Acts which are legislated by the National Assembly. Korean Acts may restrict national people's freedom and rights if such measures are necessary to ensure 'public order

or public welfare’, or ‘the purpose of safeguarding national security’. Occasionally, Emergency Executive Orders or Emergency Financial and Economic Executive Orders may have the same power in national emergency situations for the limited period of time. As mentioned in the previous chapters and sections, the vast majority of reviews in this dissertation are focused on analyses and revisions of Korean Acts (Class II). Meanwhile, it should be noted that treaties and international laws locates in the same level of domestic Acts, if such international regimes are ratified and promulgated in accordance with the Constitution. In addition, orders by administrative power collectively include Presidential Decrees (Class III) and Ordinances of the Prime Minister or head of each Ministry (Class IV). The lowest level (Class V) is for establishing and maintaining internal and practical rules of each Ministry or Agency.

4.2. Procedures of treaty ratification in Korea

The relationship between domestic laws and international laws as well as which one has priority over the other have been historically controversial issues. Generally, whereas so-called monism States such as France, Germany and Swiss grant the same power of national laws to international conventions after ratification, so-called dualism States such as United Kingdom require an independent legislative procedure to accept international conventions into their domestic legal system (Mukherjee & Brownrigg, 2013). The Republic of Korea has maintained the monism system, so an international convention may become effective once it is ratified by Korean government. Article 6.1 of the Constitution of the Republic of Korea rules that treaties concluded in accordance with the Constitution have “the same effect as the domestic laws of the Republic of Korea’. Further, in terms of conflicts or contradictions among laws, the Korean legal system has accepted so-called *lex posterior derogat legi priori*. Thus, after ratification of the WRC 2007, it may be clear that the Convention has priority over the Maritime Safety Act as well as any other relevant domestic laws in case of discordance. In addition, the Korean legal system has also introduced so-called *lex specialis derogat legi generali*. Therefore, the WRC 2007 which deals with particular issues such as time limit may be superior to the Commercial Law which generally regulates shipowners’ rights and responsibilities.

The following flow chart shows the detailed procedures of concluding international conventions in South Korea.

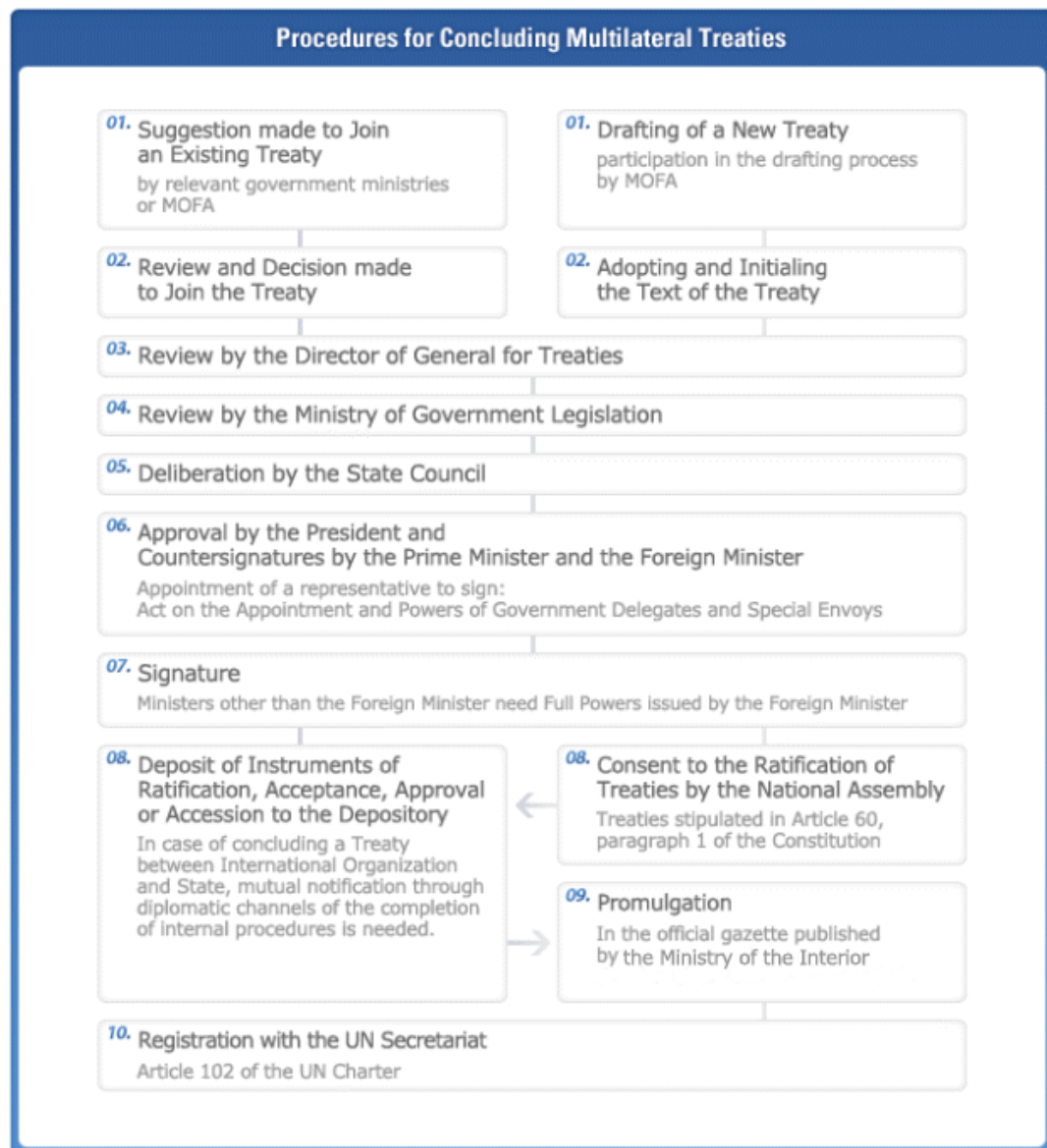


Figure 3. Procedures for concluding multilateral treaties

Source: Ministry of Foreign Affairs (www.mofa.go.kr)

As the WRC 2007 is an existing convention, the procedures may start in the left line of the diagram. First of all, a suggestion needs to be provided by relevant Ministry.

In this case, the Ministry of Ocean and Fisheries is the responsible department to review and make the suggestion to join the regime of the WRC 2007. Then, the Director-General for Treaties of Ministry of Foreign Affairs reviews the suggestion made by the Ministry of Ocean and Fisheries (step 3). Then the suggestion of ratification may be reviewed by another central administrative agency, Ministry of Government Legislation, which is mainly in charge of law-making and revision process in Korea (step 4). According to the *Constitution of the Republic of Korea*, 'proposed treaties' need to be deliberated by the State Council (Article 89.3) which may generally consist of the Ministers of each Ministry (step 5). Then, as step 6, the President is entitled to 'conclude and ratify treaties' according to Article 73 of the Constitution. In accordance with Article 3 of the *Act on the Appointment and Powers of Government Delegates and Special Envoys*, the Minister of Foreign Affairs may represent the Republic of Korea in 'signing or initialling treaties' (step 7). With regard to step 8 above, Article 60. (1) of the Constitution regulates that the National Assembly of Korea may have the right to 'consent to the conclusion and ratification of treaties pertaining to mutual assistance or mutual security; treaties concerning important international organizations; treaties of friendship, trade and navigation; treaties pertaining to any restriction in sovereignty; peace treaties; treaties which will burden the State or people with an important financial obligation; or treaties related to legislative matters'.

Although it is uncertain that whether the consent of the National Assembly is required with regard to the ratification of the WRC 2007, the possibility of being required such consent is greater than the probability of being unnecessary, considering previous records of Treaty Information provided by the Ministry of Foreign Affairs. For example, the *International Convention on Civil Liability for Oil Pollution Damage* (CLC 1969) which was ratified in 1978 and denounced in 1997 by Korean government was consented by the National Assembly. In the same year, the *Protocol of 1992 to Amend the International Convention on Civil Liability for Oil Pollution Damage, 1969* (CLC PROT 1992) was ratified with consent of the National Assembly. Similarly, the *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage* (FUND 1971) which was ratified in 1992 and denounced in 1998 by Korea was also consented by the National Assembly, then the *Protocol of 1992 to Amend the International Convention on the Establishment*

of an *International Fund for Compensation for Oil Pollution Damage, 1971* (FUND PROT 1992) was ratified with consent of the National Assembly in the same year. However, the *International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001* (BUNKERS 2001) which has been ratified in 2009 did not require the consent of the National Assembly.

4.3. Current responses and limitations

4.3.1. The five-year plan (2017~2021)

In March 2017, the Ministry of Ocean and Fisheries announced a document, '*The Second Maritime Safety Basic Plans (2017 ~ 2021)*' which includes an assessment about '*The First Maritime Safety Basic Plans (2012 ~ 2016)*', an analysis of recent marine accidents, and visions in relation to the maritime safety in Korean waters as well as six main strategies and detailed implementation plans for the visions. Among the strategies, the review of ratification of the WRC 2007 is included under Strategy 5-2 (reliability enhancement of safety management with regard to major ship traffic lanes) which is a sub-part of Strategy No. 5, Cultivation of a state of the art system in respect of maritime traffic safety management based on ICT (Information and Communication Technology). The relevant implementation plan points out the necessity of effective counterplans in response to the entry into force of the WRC 2007 and for the purpose of preventing secondary accidents due to wrecks located in major ship routes. It also plans to assess social and economic benefits, cost-bearing matters in the Korean shipping industry, and the scope of application, i.e. whether the Convention needs to apply to the Korean territorial seas or not. Further, the plan summarizes the purposes and major contents of the WRC 2007 and appreciates that both the number of Contracting States and the percentage among world tonnages are rapidly increasing after its entry into force in April 2015.

In addition, the five-year plan analyses that whereas there is no practical problem for the two Korean liability insurers, 'The Korea Shipowners' Mutual Protection and Indemnity Association' (Korea P&I Club) and 'Korea Shipping Association' (KSA) to provide a liability insurance which corresponds with the WRC 2007, the Korean government has no right to issue the certificate in accordance with Article 12.12 of the

WRC 2007 because the Republic of Korea is not currently a Contracting State of the Convention. The plan additionally mentions that Korea and China have accepted the major contents of the WRC 2007 into domestic laws rather than ratifying it, but this is a partly incorrect analysis because China already deposited the instrument of ratification on the 11th of November 2016 and the Convention entered into force three months later, i.e. from the 11th of February 2017 which was prior to the issuance of the five-year plan in March 2017. The plan finally explains that in Japan from 2005 it is compulsory for every ships larger than 100 tons to maintain the liability insurance for wreck removal prior to entering Japanese ports.

4.3.2. The yearly plan (2017) and potential risks

However, according to '*2017 Maritime Safety Implementation Plan*' of the Ministry of Ocean and Fisheries, there is no substantive working plan about the review or ratification of the WRC 2007 although some Regional Offices of Oceans and Fisheries plan to remove obstructions to navigation in accordance with the existing relevant domestic laws on a case by case basis. This may be a result of the authority's recognition that it is not urgent matter as if an immediate response is required in 2017, although any kinds of response to the international regime for wreck removal may be necessary in the next five years. It is hard to assess whether such recognition is correct or wrong, but it may be so-called 'a day after the fair' unless a firm policy stance with comprehensive reviews is already in place, prior to a disastrous wreck removal case such as *Costa Concordia* or *Rena* in 2012.

For instance, whereas the Republic of Korea deposited instruments of both the *Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969* (CLC PROT 1992) and the *Protocol of 1992 to amend The International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage* (FUND PROT 1992) in the next year of the entry into force in 1996, South Korea did not immediately respond to the *Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992* (FUND PROT 2003), which entered into force in 2005 and has been called as 'The Third Tier' for oil pollution compensation. After two years, in 2007, a catastrophic accident, *Hebei Spirit* oil spill

occurred in the west coast of South Korea and it was impossible to utilize the highest level of compensation system because Korea was not a Contracting State at that time. After the *Hebei Spirit* oil spill, public sentiment was significantly focused on the oil spill related issues including limitation of liability as well as international compensation regimes. Politicians and policy makers were under criticism that Korean victims would have been more compensated using the FUND PROT 2003 if Korean government had corresponded to the global trend at the appropriate timing. Then, in 2010 Korea finally conducted accession of the FUND PROT 2003.

4.3.3. P&I Club's blue card and government's certificate

Korea P&I Club's Rule 36.2. regulates that various certificates (so-called 'blue cards') may be issued in accordance with international conventions such as CLC PROT 1992, BUNKERS 2001, and the Athens Convention Relating to Carriage of Passengers and Their Luggage by Sea 2002. The certificate 'in accordance with Article 12 of the Nairobi International Convention on the Removal of Wrecks, 2007' is also one of them. There may be no problem for Korean or foreign shipowners to obtain such blue cards because they may be issued by any P&I Clubs once the vessels enter into contracts.

However, for Korean shipowners, a relatively complex and time-consuming procedure is required when they want to obtain the government's certificate in accordance with Article 12 of the WRC 2007. For instance, on the 22nd of December 2014, Ministry of Ocean and Fisheries announced a Public Notice (No. 2014-143) with regard to financial guarantee in relation to wreck removal in Exclusive Economic Zone. The main purpose of the Public Notice is for Regional Maritime Affairs and Port Office (subordinate and working-level agencies of the Ministry of Ocean and Fisheries) to establish procedures of issuing 'Compliance Statement of Certificate of Insurance or Other Financial Security in respect of Civil Liability for the Removal of Wrecks' which is in accordance with the Article 12 of the WRC 2007. When the government certificate is issued, the agency needs to issue an additional document, 'Note No. 4', together with the certificate. The 'Note' includes some comments including '[t]he State parties to the Nairobi International Convention on the Removal of Wrecks, 2007, is not necessarily expected to accept this certificate since the

Republic of Korea is not yet party to the Convention' and '[n]evertheless, the State parties to the Convention is hereby kindly requested to accept the above mentioned Certificate of Compliance which meets the same legal and technical requirements as the Convention Certificate, taking into consideration that the Republic of Korea is in the process of acceding the Convention in due course'.

Although the above procedure was prepared for Korean shipowners in the situation that the WRC 2007 had not been ratified by South Korea, there was no shipowner who utilize such procedure which has a great extent of uncertainty. For example, a shipowner who obtains a wreck liability insurance provided by Korea P&I Club and then receives the government certificate issued by the Korean agency may suffer a delay prior to entering a port in India or any other Contracting States of the WRC 2007, while the States assess the validity of the Korean government's certificate. The delay may be more than few days, or in the worst case the Contracting State may reject the ship's entrance to the port due to the irregular certificate issued by Korean government. Considering that time delay is the most sensitive issue for the shipping business, it is natural for Korean shipowners to avoid such uncertainty. Therefore, Korean shipowners have submitted their P&I blue cards to foreign States which have ratified the WRC 2007 and obtained the foreign government's certificate to meet the requirement of the Convention. In practice, one of the international group of P&I Clubs, Skuld, issued a circular (on the 6th of February 2015) for shipowners whose ships are not registered in the Contracting States of the Convention. The P&I Club has guided that eight maritime agencies of the Contracting States (United Kingdom, Germany, Denmark, Marshall Islands, Liberia, Palau, Cook Islands and Malta) have agreed to the government certificates for foreign vessels. Thus, Korean shipowners have maintained the foreign government's certificates based on Article 12.9 of the WRC 2007 that 'with respect to a ship not registered in a State Party it may be issued or certified by the appropriate authority of any State Party'. The Article 12.9 also rules that '[c]ertificates issued and certified under the authority of a State Party shall be accepted by other States Parties for the purposes of this Convention and shall be regarded by other States Parties as having the same force as certificates issued or certified by them, even if issued or certified in respect of a ship not registered in a State Party'.

5. Summary and Conclusions

As an alternative way to narrow gaps between the global trend and the Korean regime with regard to the wreck removal matters, this dissertation studies how the national laws could be improved and enhanced through further revisions.

From the public law viewpoint, the WRC 2007 defines the 'wreck' as a sunken or stranded ship, or any parts or objects lost from such ship, or a ship that is expected to do so. Although the Convention basically applies to the EEZ of the Contracting States, the scope of application may be extended to the territorial seas of the States with an explicit declaration. The master and the operator of a ship are required to immediately report to the Affected State about the marine casualty including the location, size, damage, cargo and oil. The Affected State may consider conditions of the wreck from hydrographical, meteorological, technical, environmental and marine traffic viewpoints, then decide whether the wreck is required to be marked in accordance with the international buoyage system and promulgated by the nautical publications. In order to facilitate the removal of wreck, the Convention regulates that the registered owner is responsible for the costs of wreck removal which may be conducted by a salvor in a contract, and is required to present a certificate of wreck liability insurance. The Affected State may inform to and discuss with the wreck's flag State, and is allowed to interfere the wreck removal operation in respect only to the matters of safety and protection of marine environment. Also, the Affected State may intervene only to the effectiveness of wreck removal operation, and is required to determine a reasonable period of the operation and inform it to the registered owner. An immediate intervention by the Affected States may be conducted if the owner fails to complete the removal by the deadline without a proper notification, or it impossible to contact the registered owner, or the wreck becomes a severe hazard.

In the Republic of Korea, four different domestic laws deal with the public law matters in relation to wrecks. Firstly, the *Maritime Safety Act* which applies in the territorial sea, inland waters, and the EEZ has introduced the latest legal definition of 'obstruction to navigation' which is used instead of 'wreck'. The Act requires master, owner or operator of the wreck to immediately report the location and condition of it. Further, it is necessary to assess the wreck's influence on navigational safety and marine environment, and its Enforcement Rules contain almost same criteria of the

WRC 2007. The Act also deals with marking procedures when the wreck is likely to jeopardize the safe navigation of ships. The registered owner is required to put a sign indicating the hazard, and the Minister of Oceans and Fisheries may directly conduct such measure if the owner fails to fulfil the obligation. In addition, the Act stipulates that the registered owner is obliged to remove the wreck. If the owner fails to conduct such order, the Minister of the authority may remove the wreck and ban the entry of the ship in question into Korean ports or mooring facilities, or the departure therefrom. Secondly, the *Public Waters Management and Reclamation Act* which applies in the territorial sea as well as EEZ regulates that the Minister of Oceans and Fisheries or local government may order the removal of sunken ship, derelict waste material, or other object if the wreck impedes the utilization of public waters or creates pollution. The central or local government may remove the wreck if the owner is unknown or fails to comply with the order. Further, the management agency of public waters needs to conduct 'a prior investigation' to ascertain whether a wreck may create pollution or impediment of maritime utilization. Thirdly, the *Marine Environment Management Act* express the wreck as 'sunken ship' which requires systemic management, risk assessment, and risk-mitigation measures. The Act applies in the territorial sea as well as EEZ, likewise the aforementioned national laws. Finally, the *Act on the Arrival, Departure, etc. of Ships* stipulates that the Minister of Oceans and Fisheries may order owners or users of an object which obstructs the navigation of vessels in a trade port or in a place adjacent to the water zone of a trade port. If the owners or users do not comply with such order, the Authority may vicariously execute the ordered measure.

As mentioned in the previous paragraph, from the public law standpoint, all necessary requirements of the WRC 2007 are already in place in the national laws due to the continuous accordance with the international tendency although Korea has not ratified the WRC 2007 yet. It may be possible to conclude that in general, there is no significant gap between the Convention and the domestic laws. However, two limitations still exist. The first one is that four different national Acts presently deal with the wreck related matters. Such duplication may be a natural result because there had not been an individual attention to wreck prior to the Convention and the Maritime Safety Act, and the wreck removal matters have been a peripheral part of the other Acts which have been developed for their main purposes. However, from economic

and efficient standpoints, it is unnecessary any longer to maintain the scattered and unorganized regulations for the exactly same matters. Thus, a consolidation of regulations among the Acts is highly required for a more concise and explicit legal regime. Similarly, an adjustment or rearrangement of work scope in the Ministry of Oceans and Fisheries is necessary because three different departments in the Ministry are concurrently related to the wreck removal matters. The second limitation is unlikely to be solved unless Korea ratifies the Convention. Although the Korean law-makers want to apply the national Acts in the EEZ, the registered owner of wreck may insist that Korea has no jurisdiction for the wreck without any environmental pollution. Thus, it is necessary to ratify the Convention to eliminate such uncertainty and controversy.

On the other hand, from the private law viewpoint, the WRC 2007 regulates that the registered owner is basically liable to pay wreck related expenses unless the owner proves an act of war or an exceptional and inevitable natural phenomenon, or third party's whole liability, or any Government's negligence in respect of navigational lights and aids, likewise with CLC PROT 1992 and BUNKERS 2001. In addition, the Convention does not affect the State's national laws or application of existing compensation conventions. Any ships of 300 GT or more need to maintain the liability insurance cover at least an amount of LLMC 1976, and such security is examined and approved by the government's certificate. Further, identically with CLC PROT 1992 and BUNKERS 2001, the WRC 2007 allows victims of the wreck to directly claim against the liability insurer who may defend with limitation of liability. Such claim is required to be brought within three years from the date of hazard determination, and the right to claim extinguishes after six years from the casualty.

In the Republic of Korea, although both the Maritime Safety Act and the Marine Environment Management Act simply stipulates that the registered owner pays expenses of marking and removing wrecks, there is no more specific regulation in the two Act. Thus, a more general law, the *Commercial Act* shall apply for the liability matters. The Act rules that shipowners are generally entitled to limit their liabilities whatever the cause for the claim may be, unless the damage occurs because of wilful misconduct or other reckless act or omission while recognizing the concern about the incurrence of such damage. Further, the Act has selectively borrow the calculation of

liability limitation from LLMC 1976 (personal and property claims) and LLMC PROT 1996 (passenger claims). However, with regard to the wreck removal matter, the Act explicitly regulates that shipowners are not entitled to limit their liability. The aforementioned regulations are not expected to be affected by the ratification of the WRC 2007 because it is one of the intentions of the Convention.

In respect of the compulsory insurance for wreck removal, none of the Korean laws presently has such rules and this is the most vulnerable point from victim's interest standpoint. Therefore, a further revision of the Maritime Safety Act is urgently necessary to protect innocent victims because it is unlikely for Korea to ratify the Convention in a year, considering the recently issued plans of the Ministry of Oceans and Fisheries. In addition, although the direct action against the insurer may be possible if an oil pollution occurs from a wreck of tanker or other type of ship, such right is based on the Compensation for Oil Pollution Damage Guarantee Act which consolidates CLC PROT 1992 and BUNKERS 2001 into one national law, and such action is impossible unless the oil spill occurs. In other words, the liability insurer is still enabled to reject the direct claim based on the 'pay to be paid' rule. Lastly, in terms of the time limits, none of the aforementioned Acts deals with the matter in relation to wreck removal claims. Thus, another more general law, the *Civil Act*, shall be applied. The damage due to a wreck is one of torts and the Act rules that the right to claim for damages shall lapse by prescription after three years from the awareness of such damage and the person responsible. Additionally, such rights shall become extinct after ten years from the unlawful event.

With regard to the considerations on the ratification of the WRC 2007, it should be noted that the Korean legislative system has five classes. The Constitution is the paramount law and the lower classes of law are required to comply with the Constitution's principles and philosophy. In the hierarchy, Acts including aforementioned national laws are at the second level, and treaties and international laws locate in the same level of the Acts if such international regimes are ratified and promulgated in accordance with the Constitution. The Republic of Korea is one of the monism States, so the WRC 2007 may have the same power as national laws after the ratification. If there are any conflicts between the Convention and the Korean Acts, from the public law viewpoint, the Convention may have priority over the Maritime

Safety Act due to the principle of *lex posterior derogat legi priori*, and from the private law standpoint, the Convention may also have priority over the Commercial Law as well as the Civil Law due to the principle of *lex specialis derogat legi generali*. In order to ratify the Convention, the Ministry of Ocean and Fisheries firstly needs to suggest the ratification to the Director-General for Treaties of Ministry of Foreign Affairs. Then, the suggestion may be reviewed by another central administrative agency, Ministry of Government Legislation. The next steps are the deliberation by the State Council which generally consist of the Ministers of each Ministry, and the President's conclusion. Then, in accordance with the Constitution of the Republic of Korea, the National Assembly may have the right to consent to such ratification on the case-by-case basis. Whereas the ratifications of CLC PROT 1992 and FUND PROT 1992 were conducted with the National Assembly's consent, the ratification of BUNKERS 2001 did not require such consent.

In terms of the recent responses by the Ministry of Ocean and Fisheries, whereas the five-year plan (2017~2021) recognizes the global mainstream and the necessity of effective counterplans to the entry into force of the Convention, and intends the assessment of social and economic benefits, cost-bearing matters in the national shipping industry, and the scope of application, there is no substantive implementation schedule about the review or the ratification in the yearly plan in 2017. This may be a result of the authority's recognition that it is not urgent matter as if an immediate response is required. Although it is difficult to evaluate whether such recognition is correct or wrong, a firm policy stance with comprehensive reviews is required to be in place prior to a disastrous wreck removal case in the Korean waters. In addition, although the Ministry attempted the issuance of government certificate without the ratification and purposed both the Contracting States of the Convention and Korean shipowners to accept such irregular certificate, it has not actualized due to the uncertainty and the Korean shipowners have maintained foreign State's certificates.

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